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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Presearch, Inc.

File: B-227097

Date: July 7, 1987

DIGEST

1. A protester bears a heavy burden of proof when alleging bad faith on the part of government officials; it must show by virtually irrefutable proof that these officials had a specific or malicious intent to injure the protester.
2. Even if it is assumed that a technical evaluation panel member was biased, protester must show that this translated into action which adversely affected the protester's competitive position.
3. A solicitation for a requirements type contract that provides that written course material must be furnished at a school-grade level acceptable by the agency without identifying the specific grade level that will be required is appropriate since the agency will identify the specific grade level of future requirements in individual delivery orders to be issued under the contract.

DECISION

Presearch, Inc. protests the award of a contract under request for proposals (RFP) No. DABT56-87-R-0003, issued by the Army Engineering Center, Fort Belvoir, Virginia, for a requirements contract for services, including the furnishing of written studies, to assist the Army in implementing a standards based manpower requirements system. The contractor is to provide various categories of labor to perform tasks ordered through the issuance of individual delivery orders. Presearch protests the presence on the Army's evaluation panel of an allegedly biased evaluator. Presearch also believes that certain provisions of the solicitation are ambiguous.

We deny the protest.

The solicitation was issued on March 3, 1987 with the closing date for receipt of initial proposals scheduled for April 21, 1987. Presearch filed an agency-level protest prior to the time set for receipt of proposals. After the Army proceeded with the receipt of proposals, Presearch

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timely filed its protest with our Office on May 5, 1987. Presearch asserts the same grounds for protest as it did in its agency-level protest. Proposals have now been evaluated by the agency.

First, Presearch states that a key Army employee, identified as a contracting officer's representative (COR) in the RFP and who was responsible for administering a prior Presearch contract, has demonstrated "such bad faith and anti-Presearch bias as to render impossible free and open competition." Specifically, Presearch states that the COR attempted to obtain a downward equitable adjustment under Presearch's contract with full knowledge, reflected in documents she prepared, that the government was not so entitled to the adjustment; that the COR withheld payment owing to Presearch in order to "force" Presearch to perform work in excess of contract requirements; and that the COR misrepresented material facts to hide her own responsibility for delays in contract performance by Presearch. As a specific example of Presearch's allegations, we quote from an affidavit that Presearch has submitted:

"I [Presearch] have had numerous discussions with [the COR] concerning Army-proposed changes to the scope of work [on a delivery order] which she demanded that Presearch perform at no additional cost to the government . . . Typically, these discussions degenerated into arguments with her raising her voice, threatening to cancel the delivery order, making uncomplimentary remarks about selected Presearch employees . . . My 'cooperation' on an existing delivery order was being solicited at the expense of the company for the likelihood of future work."

There are similar affidavits in the record. Consequently, Presearch requests that our Office direct the Army to remove this employee from the evaluation panel or any other position of influence.

In a statement filed with our Office, the COR, who was on the evaluation panel, denies any impropriety and states that she has performed her job to "fairly and impartially represent [the Army] and the American taxpayer," and that her conduct "has always been fair, impartial, professional and beyond reproach." We need not go into further detail on this issue.

A protester bears a heavy burden to show bad faith by contracting officials, and must submit virtually irrefutable proof that officials had a specific and malicious intent to

harm the protester. See Syosset Laboratories, Inc., B-212139, Sept. 23, 1983, 83-2 CPD ¶ 369. We think that the allegations such as the protester has presented fall well short of the proof required to establish bad faith on the part of a government official. The COR characterizes Presearch's allegations as "half-truths and distortions of facts," and clearly they are refutable. The record shows that there is apparently a dispute as to whether Presearch is entitled to an equitable adjustment as a result of its performance under the prior contract. Presearch must pursue its remedies under the standard contract disputes clause if it feels it has been wronged. Moreover, even if it is assumed that this evaluator was biased, it must be shown that this bias translated into action which affected Presearch's competitive position. Nuclear Assurance Corp., B-216076, Jan. 24, 1985, 85-1 CPD ¶ 94. The record shows that this evaluator gave Presearch's proposal higher scores than most of the other evaluators and there is no evidence in the record, contrary to Presearch's suggestions, that this evaluator adversely influenced other evaluators against Presearch's proposal. Accordingly, this protest ground is denied.

Next, Presearch complains that several solicitation provisions require work to be performed "in accordance with the current approved version" of an applicable Army regulation. Presearch questions whether this means current as of the date of contract award, current as of the date of the issuance of a delivery order, or current as of the date of delivery of an item. Presearch is primarily concerned with whether the successful contractor will be required to update written deliverables at its own expense to comply with subsequent regulatory changes.

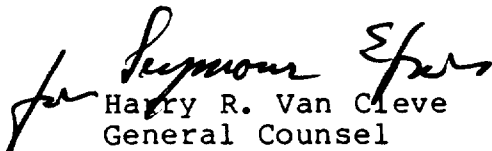
In response, the Army states that current copies of all applicable regulations, as of the date of the solicitation, were made available to all interested offerors to review at the contracting agency's offices; the offerors could use these as guides in preparing their offers. Further, the contracting officer states that when applicable regulations are changed, the prospective offeror would be notified and an equitable adjustment under the "Changes clause" would be made, if required. Moreover, the contracting officer explains that a contractor would not be required to redo work on a complete task order due to changes in regulations without an equitable adjustment.

An ambiguity exists only if the solicitation provision is subject to more than one reasonable interpretation. Nasuf Construction Corp.--Reconsideration, B-219733.2, Mar. 18, 1986, 86-1 CPD ¶ 263. Despite the assertions of the protester, we do not think it is reasonable to interpret a

provision that work be performed in accordance with a current version of an applicable regulation as permitting the agency to require a contractor to update a completed written deliverable to comply with subsequent regulatory changes at the expense of a contractor.^{1/} The agency has refuted this interpretation and has explained its interpretation (regulations current as of the date of the solicitation). Simply put, we do not think this provision can reasonably be read as authorizing the agency to update material already delivered. While the government retains the right to approve, conditionally approve, or reject deliverables and to have them corrected at the contractor's expense, we do not think that this provision extends to correction of deliverables for subsequent regulatory changes. As for work in progress, the contractor is reimbursed under this requirements contract for manhours expended in performing the task order regardless of which regulation is in effect at the time of the work. Accordingly, we see no ambiguity in the solicitation provision.^{2/}

Finally, Presearch also complains that the school-grade level of written course material should be established in advance. The contracting officer states that the grade level will be identified on each individual task order issued by the Army under the contract. Since the specific grade level of the various task orders are not presently known, we think that their identification in the delivery orders is appropriate.

The protest is denied.


Harry R. Van Cleave
General Counsel

^{1/} This applies equally to other solicitation provisions which specify "current draft version" of applicable regulations.

^{2/} Presearch also complains about a solicitation provision permitting the Army to require the contractor to incorporate agency comments into written deliverables. Again, we do not think that this provision can be reasonably interpreted as requiring, at the contractor's expense, correction of deliverables to incorporate agency comments after receipt by the agency and without prior notice to the contractor.